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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 433.

Office Supreme Court U.
FILED
NOV 17 1903
JAMES H. McKENNEY,
Clerk

THE STATE OF MINNESOTA,
Appellant,

vs.

NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY AND JAMES J. HILL, AS PRESIDENT OF THE NORTHERN SECURITIES COMPANY, AND INDIVIDUALLY,
Appellees.

MOTION TO DISMISS APPEAL.

Now come the appellees above named and move the Court that the above entitled appeal, which is taken from a decree of the Circuit Court of the United States for the District of Minnesota, be dismissed for the reason that the same, having been taken directly to this Court, is not authorized by law.

JOHN G. JOHNSON,
GEO. B. YOUNG,
M. D. GROVER,
C. W. BUNN,
Counsel for Appellees.

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Appellees.

NOTICE OF MOTION.

To W. B. Douglas, M. D. Munn and Geo. P. Wilson, Counsel for Appellant:

Gentlemen: You will please take notice that a motion of the appellees to dismiss the above entitled appeal (a copy of which motion and of the appellees' brief in support thereof is herewith served upon you), will be presented to the United States Supreme Court on Monday, November 30, 1903, at the opening of the court or as soon thereafter as counsel can be heard.

Dated November 4, 1903.

JOHN G. JOHNSON,
GEO. B. YOUNG,
M. D. GROVER,
C. W. BUNN,
Counsel for Appellees.

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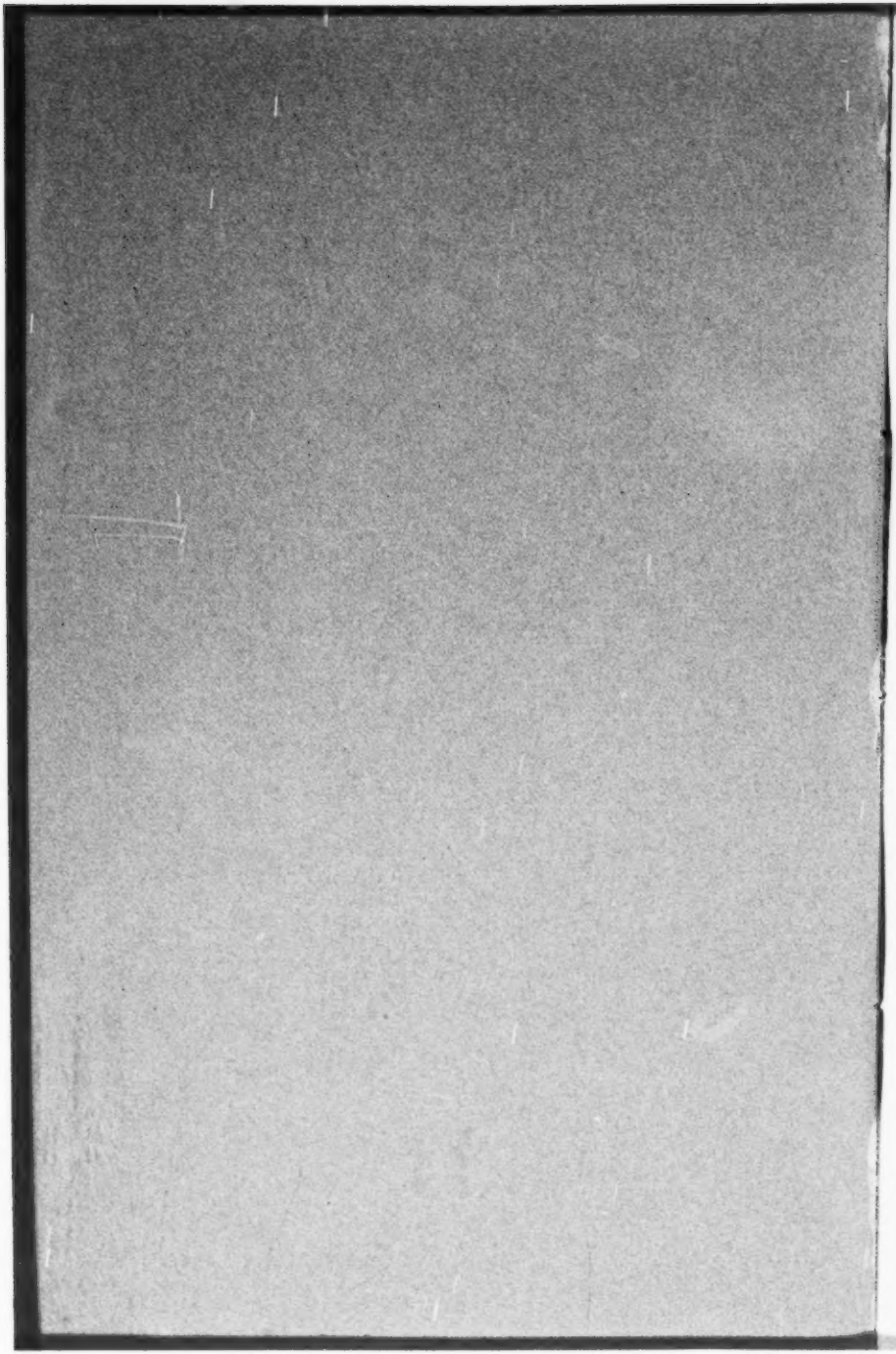
Appellees.

BRIEF ON MOTION TO DISMISS.

JOHN G. JOHNSON,
GEO. B. YOUNG,
M. D. GROVER,
C. W. BUNN,
Counsel for Appellees.



30381

Supreme Court of the United States.

OCTOBER TERM, 1903.

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THE STATE OF MINNESOTA,
Appellant,

vs.

NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY AND JAMES J. HILL, AS PRESIDENT OF THE NORTHERN SECURITIES COMPANY, AND INDIVIDUALLY,
Appellees.

BRIEF ON MOTION TO DISMISS.

The appeal in this cause was taken directly to this court by the plaintiff, the State of Minnesota, from a decree of the Circuit Court for the District of Minnesota.

Such direct appeal can be sustained only upon the ground that the case involves the construction or ap-

plication of the Constitution of the United States, or that the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

But the record shows that while the suit was founded on various federal as well as state statutes, the real controversy was:

(1) Whether the acts of appellees were in violation of the State laws prohibiting consolidation of parallel railways.

(2) Whether such acts were in violation of the State Anti-Trust law.

(3) Whether the state could sue in equity to enforce the provisions of its own Anti-trust law.

(4) Whether the state could sue in equity for relief under the Federal Anti-trust law.

The Circuit Court in the opinion filed by Judge Lochren, decided these points:

(a) That the acts of defendants did not violate the State Anti-consolidation laws, and that such laws were a valid exercise of its police powers.

(b) That the State Anti-trust law was valid as against an objection that its terms embrace interstate commerce; but that it did not prohibit what had been done by defendants.

(c) That the State Anti-trust law does not authorize a suit in equity by the state to enforce its provisions.

(d) That the state could not sue in equity to compel the observance of the Federal Anti-trust law.

Clearly none of these rulings involved the construction or application of the Constitution of the United States.

The direct appeal can be maintained, if at all, only under section 5 of the Act of March 3, 1891, which provides for such appeals:

"In any case that involves the construction or application of the Constitution of the United States."

"In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

To warrant a direct appeal from the Circuit Court to this Court on constitutional grounds, the case must involve a constitutional question really and substantially and not imaginatively. In this respect the rule is the same as on writs of error to a state court, and the rule applied in *Sawyer v. Piper*, 189 U. S. 154, to such writs of error, viz, that the question must be a real and not a fictitious one, is applicable to writs of error and appeals from the Circuit Court. Otherwise any case could be so framed by an artful pleader that it could be brought to this Court.

It is not enough the case involves a Federal question, and so was properly brought in the Circuit Court as a case arising under the *laws* of the United States. The *Constitution*, in its construction or application, must be involved.

Nor is the question here whether a judgment of the Circuit Court of Appeals would be final under section 6 of the Act of 1891. The sole question is

whether, under section 5, a direct appeal can be taken from the Circuit Court to this Court.

It is not material that a constitutional question *might* have been raised here by the appellees had they been defeated below, or that, if some different decision had been made in the case, a constitutional question *might have become involved.* The decisions of this court settle that the constitutional question must be in the case *actually* and not potentially; that is, that the question must have been directly decided by the lower court or have been necessarily involved in what was decided.

Ansbro v. United States, 159 U. S. 695, 697.
Cornell v. Green, 163 U. S. 75, 78.
Muse v. Arlington Hotel Co., 168 U. S. 430, 435.
Western Union Telegraph Co. v. Ann Arbor R. Co., 178 U. S. 239, 243.
Lampasas v. Bell, 180 U. S. 276, 282.

And the constitutional question must not only be present, and be a real and substantial question, but it must be the controlling question.

In *Carey v. Houston & Texas Central Ry.*, 150 U. S. 170, 181, this Court held:

> "In order to hold this appeal maintainable as within * * * the fourth class in the enumeration of the Statute, the construction or application of the Constitution of the United States must be involved *as controlling*, although on appeal or error all other questions would be open to determination if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution."

And in *Carter v. Roberts*, 177 U. S. 496, 500:

> "When cases arise which are *controlled* by the construction or application of the Constitution of the United States, a direct appeal lies to this Court."

This same rule of course applies to appeals under the 6th class, for the question whether a state law contravenes the Federal Constitution certainly "involves the construction or application" of that instrument.

The only ground for a claim that this case involves the construction or application of the United States Constitution, or the question of contravention of that constitution by a state law, is found in the following passages in the record. (1) At the end of paragraph XI, of the Bill, to-wit:

> "And if said Northern Securities Company is allowed to hold and control the stocks of said railway companies and to carry out the purpose and objects of its incorporators as well as its own, full faith and credit will not be given to the public acts of this complainant, and it will be deprived of a further right guaranteed to it by the Constitution of the United States."
>
> (Record, Vol. I, p. 26).

(2) At the end of paragraph VII of the Answer of the Northern Securities Co., viz:

> "These statutes" (i. e. the State Anti-trust and Anti-consolidation law, pleaded in paragraph X of the Bill—Record, pp. 22-24) "the defendants say are in violation of the constitution of the United States." (Record, Vol. 1, p. 64).

(3) The following Assignments of Error (Record, Vol. 1, p. 131):

> "(26) The Court erred in finding and holding that the plan and purpose of organizing the Northern Securities Company for the purpose and in the manner set forth in complainant's complaint, and as shown by the testimony; and the subsequent consummation of such plan and purpose by the issuance and exchange of the stock of the Northern Securities Company for a majority of the stock of the Great Northern and Northern Pacific Railway Companies, did not invade and violate the rights guaranteed to the State of Minnesota under Article IV. of the Constitution of the United States.
>
> "(27) The Court erred in finding and holding that the formation of the Northern Securities Company under the laws of the state of New Jersey for the purpose set forth in complainant's complaint, and as shown by the testimony; and the attempt of the incorporators of said Northern Securities Company to avail themselves of the sovereign power of New Jersey, delegated by said laws, for the purpose set forth in complainant's complaint, and as shown by the testimony, did not constitute a violation of the right guaranteed to the State of Minnesota under said Article IV of the Constitution of the United States, which provides that full faith and credit shall be given in each State to the public acts and records of every other State."

So far as concerns the above quoted averment of the bill and the assignments of error, it is only necessary to glance at them to see that no question arising under the Constitution of the United States is involved, and that they give no right to bring here an appeal direct from the Circuit Court. It is too obvious for serious discussion that the provision of the Constitution referred to by the appellant can,

in no possible view, have aught to do with the case. Whatever ruling may be made or conclusion reached, no interpretation or application of that provision can become involved. As well might the appellant have referred at random to any other clause of the Constitution. The reference to the one thus arbitrarily selected seems clearly to have been an effort of the pleader to create an artificial ground for a direct appeal to this court. If the effort proves successful, the efficiency of the Circuit Court of Appeals in relieving this Court of an intolerable burden of legal work will be at an end.

As to the averment in the answer, viz: "These statutes, the defendants say, are in violation of the Constitution of the United States," it will be observed that it makes no reference to any provision of the Constitution, does not specify what provision is claimed to be contravened. And the state statutes pleaded in the bill and to which this averment in the answer is addressed are three in number, and differ widely in their scope and in their provisions. Record, Vol. I, pp. 22-24.

It is at least doubtful whether the averment in the answer is sufficient to raise any constitutional question as to any of the state statutes.

However this may be, the record shows that the court held the Anti-consolidation Acts to be a valid exercise of the police power of the state, citing *Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 677. (Record, Vol. I, p. 120). And it may be added that these very statutes had been held valid by this

Court in *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, (the state itself being a party, and filing a brief, in this court) so that any constitutional question which theretofore existed in respect of their validity, exists no longer, and hence cannot be involved in this case.

Western Union Telegraph Co. v. Ann Arbor R. Co., 178 U. S. 239, 243.

In respect to the State Anti-trust law the Court held that though in terms it assumed in some particulars to regulate interstate commerce, yet these provisions might be disregarded, and the act held valid as to trade and commerce within the state. (Record, Vol. I, p. 113). And at the argument the counsel for the state expressly disclaimed any ground of suit on the interstate provisions of the act. And the Court held that the acts of the defendants complained of by the plaintiff, are not among those forbidden by the State Anti-trust Act, and the case is not within that act. (Record, Vol. I, p. 117).

And the decision in the *Pearsall case* also determined the validity of the Anti-trust law no less than that of the Anti-consolidation laws as applied to this case. Here the only subject to which that law is sought to be or can be applied, is the ownership of stock in two competing railway companies doing a domestic and an interstate business—the very subject to which the Anti-Consolidation laws were applied, and their validity sustained in that case. In the *Pearsall case* and again in the *Louisville & Nashville* case, it was held that the State by its Anti-

Consolidation laws might regulate such stock ownership, though the companies were engaged in interstate commerce. And this foreclosed any constitutional question on the right of the State to make the same regulation by the Anti-trust law. The question whether the State Anti-trust law may be invalid as assuming to regulate interstate commerce in matters not involved in this case cannot possibly arise here.

It is evident that as the case now stands there is in it no constitutional question—certainly none that is controlling. The appellant certainly does not seek a reversal of the decision below sustaining the validity of its own statutes. What it seeks to reverse and all it seeks to reverse is the decision that the statutes, though valid, do not embrace this case—do not forbid such stock holding as that of the Northern Securities Co., and that therefore such statutes have not been violated.

The appeal should therefore be dismissd.

JOHN G. JOHNSON,
GEO. B. YOUNG,
M. D. GROVER,
C. W. BUNN,
Counsel for Appellees.